Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1552

Appeal P-9600402

Ministry of the Environment

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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to radioactive and other wastes and materials stored at the Chalk River Nuclear Laboratories of Atomic Energy of Canada Limited (AECL). The requester also sought information relating to on-site and off-site contamination, releases to the air, ground water and surface water, as well as the effects upon plant life, animals and humans. The requester represents the Nuclear Awareness Group.

The Ministry determined that the interests of a third party would be affected by the disclosure of some of the information. The Ministry notified AECL pursuant to section 28 of the Act and requested representations with respect to the release of these records. AECL consented to disclosure of some of the records.

The Ministry disclosed the records for which consent had been obtained and denied access to the remaining records based on the following exemptions under the Act:

- Cabinet records - sections 12(1)(b) and (e)
- advice to government - section 13(1)
- intergovernmental relations - section 15
- third party information - section 17(1)

The requester (now the appellant) appealed the Ministry's decision. During the course of mediation, the appellant maintained that disclosure of the records at issue would be in the public interest. Therefore, section 23, the public interest override, is also at issue in this appeal.

This office sent a Notice of Inquiry to the appellant, the Ministry and AECL. Representations were received from all parties.

Initially, AECL took the position that the Act is not constitutionally applicable to the records containing information relating to atomic energy, nuclear power facilities, nuclear waste management facilities and nuclear fuels. However, AECL has indicated that it will not pursue this argument on the condition that its decision not to raise the constitutional issue in this appeal should not be considered as a waiver of its rights to object to disclosure under the Act on a constitutional basis in future appeals.

In its representations, AECL raised the application of section 16, which had not been claimed by the Ministry, with respect to specific parts of Records 1 and 22. The Ministry, in its representations, claimed that it did not have control of the records because it had no authority to disclose the records. As a result, a Supplementary Notice of Inquiry was issued to the Ministry, the appellant and AECL. In addition, because it appeared that the interests of additional third parties, including the Atomic Energy Board of Canada (AECB), may be affected by disclosure of the records, these parties were sent copies of the Notice of Inquiry and the Supplementary Notice of Inquiry and invited to make representations.

In response to the Supplementary Notice of Inquiry, representations were received from the appellant, the Ministry, AECL, AECB and one of the other affected parties.

In its initial representations, the Ministry indicated that it was no longer relying on section 13 to exempt Record 59. This was the only exemption claimed to exempt this record, therefore, it should be disclosed to the appellant.

RECORDS:

Records 1, 3, 9, 22, 24, 27, 28, 30, 32, 37, 38, 41, 47, 49 and 61 remain at issue in whole or in part. They consist of reports, correspondence and communications, meeting notices and a cabinet submission briefing note.

PRELIMINARY ISSUES:

Custody or Control

In its representations in response to the original Notice of Inquiry, the Ministry submitted that the records are under the control of the federally regulated corporation, AECL, and, therefore, Executive Council does not have the authority to release these records.

Section 10(1) of the Act provides that every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22; or the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

In Order 120, former Commissioner Sidney B. Linden set out a number of factors that would assist in determining whether an institution has custody or control of a record.

Some of the factors listed in Order 120 are evidence of custody, some are evidence of control and some factors are evidence of both. There is an intended distinction between the concepts of custody and control. An institution that has control of a record may not have the record in itsM custody, alternatively, an institution with custody of a record may not have full control. In order to fall under the jurisdiction of the Act, an institution need only have custody or control of a record (Order P-239). The Act can apply to information which originated with a non-institution which is in the custody or under the control of an institution (Order P-239).

The Ministry has submitted that it does not have the power to govern the use of the records to the extent required to render them accessible under the Act. The Ministry states that all the records at issue, except Records 30, 32 and 61, were provided voluntarily to the Ministry to keep the Ministry informed about the storage of radioactive wastes. The Ministry submits that since the information is only shared to keep them informed, they do not have a right to this information. In my view, the fact that there may be limits on the Ministry's ability to govern the use of the records is relevant to the issue of whether the Ministry has control of the records, but does not preclude the Ministry from having custody (Order P-239).

In Order 120, former Commissioner Linden stated that although mere possession of a record by an institution may not constitute custody or control in all circumstances, physical possession of a record is the best evidence of custody, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession.

In the circumstances of this appeal, I find:

(1) the majority of the records not created by the Ministry were created by the AECL for use by AECB in regulating its operations;

(2) all of the records were provided to the Ministry because of its participation in a committee with federal regulators which involved the inspection of the Chalk River site;

(3) the Ministry currently has a copy of the records in its possession;

(4) approximately half the records have been in the possession of the Ministry for a minimum of two years; others for four or six years;

(5) the Ministry is responsible for the care and protection of its copies of the records. The Ministry maintains a unique file for the material received from AECL, AECB and Environment Canada and kept under lock and key. This Cabinet is in the same file room as other provincial records;

(6) the records relate to the Ministry's mandate and function in that they relate to the storage of material that could pose a threat to the environment;

(7) the Ministry responded to the request and participated in mediation implying that it had the right to deal with the records; and

(8) the limitations placed on the Ministry by AECL do not limit the Ministry's custody of the records, rather they limit the Ministry's control of the records. The Ministry does not have the right to destroy the record. AECL has requested the Ministry return the records produced by AECL to AECL;

Having reviewed all of these circumstances, I am of the view that the Ministry has more than bare possession of the records. The Ministry also has the duty to take care of and preserve the records. Therefore, I am satisfied that, for the purposes of the Act, the Ministry has custody of the records.

DISCUSSION:

CABINET RECORDS

Section 12(1)(b), (c) and (e) of the Act states:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

It has been determined in a number of previous orders that the use of the term "including" in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of the Executive Council or its committees (not just the types of records listed in the various parts of section 12(1)), qualifies for exemption under section 12(1).

Other orders have held that a record which has never been placed before an Executive Council or its committees may nonetheless qualify for exemption under the introductory wording of section 12(1). This result will occur where a government organization establishes that the disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees, or that its release would permit the drawing of accurate inferences with respect to the substance of deliberations of an Executive Council or its committees.

Record 61 is entitled "Briefing Note on Non-Ministry's Cabinet Submission" and pertains to a Cabinet Submission by the Ministry of Municipal Affairs. The Ministry states this record was intended to brief the Minister of Environment and Energy on a matter that was to be discussed at the Jobs Committee of Cabinet.

The briefing note clearly identifies the substance of the Cabinet Submission including the options recommended which would be discussed at the Cabinet Committee meeting. The Ministry's interests are also outlined. Therefore, in my view, disclosure of the record would reveal the substance of deliberations of an Executive Council. Accordingly, it qualifies for exemption under the introductory wording of section 12(1) of the Act.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry submits that section 15 applies to the records. This section states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution; or

> (c) reveal information received in confidence from an international organization of states or a body thereof by an institution,
>
> and shall not disclose any such record without the prior approval of the Executive Council.

As neither the Ministry nor AECL or AECB have made representations with respect to section 15(c), I shall not consider it in relation to the records at issue in this appeal.

Section 15(b)

For a record to qualify for exemption under section 15(b), the institution must establish that:

1. the records reveal information received from another government or its agencies; **and**

2. the information was received by an institution; **and**

3. the information was received in confidence.

[Order 210]

The Ministry states that Ministry staff sit on a committee at the invitation of AECL to discuss matters that may affect the environment. As a result of its involvement on this committee, it was provided with the majority of the information which makes up the records at issue. The other records at issue, with the exception of Record 61, reflect the comments of Ministry staff to issues raised by AECL, AECB or Environment Canada.

There appears to be some confusion on the part of the Ministry regarding the exact source of individual documents which make up the records at issue. Nevertheless, having reviewed the representations of the Ministry, AECL and AECB and the records themselves, I am convinced that Records 1, 3, 9, 22, 24, 27, 28, 37, 38, 41, 47 and 49 were received from either AECL, AECB or Environment Canada either directly or indirectly. Therefore, I find that they were received from another government or its agencies.

With respect to Records 30 and 32, the Ministry argues that disclosure of these two records created by Ministry staff would also "reveal" information received in confidence. The Ministry states that Records 30 and 32 contain advice from Ministry staff to AECL regarding its waste storage facility.

In the context of sections 17 and 13 of the Act, a number of previous orders have established that information contained in a record would reveal information "supplied" within the meaning of section 17(1) or advice within the meaning of section 13, if its disclosure would permit the drawing of accurate inferences with respect to information actually supplied or advice given. (e.g. Orders P_218, P-1000, P-1054 and P-1231). In my view, a similar approach is warranted by the wording of section 15(b) which permits the exemption of information where the

disclosure could reasonably be expected to **reveal** information received in confidence from another government or its agencies. Therefore, if information contained in a record would permit the drawing of accurate inferences with respect to information received from another government or one of its agencies, this information can be said to reveal the information received.

Records 30 and 32 are letters/memoranda from Ministry staff to AECB commenting on issues raised in Records 1 and 22. As such, their disclosure would reveal the contents of these records. Therefore, I find the disclosure of Records 30 and 32 would also reveal information received from another government.

I must now determine if the information was received in confidence.

The appellant states:

> In regard to the possible application of the exemption under section 15(b) of the Act, it is submitted that the records in question were not provided to the Ministry in confidence as they are part of the necessary documentation exchanged between the parties as part of the regulatory relationship between AECL and the Ministry as it pertains to waste disposal in the province.

I disagree. Even if the information was supplied to the Ministry as part of its mandate, it does not follow that the information has not been received in confidence.

The Ministry, AECB and AECL have made representations as to the general expectation of the parties regarding the confidentiality of the information received. The Ministry submits that its staff have always had the understanding from AECL that information shared with Ministry's would be kept confidential based on the nature of the material stored at the Chalk River site. The Ministry states that this is supported by the AECL classifications noted on the documents and the mark "Confidential" which appears on most of the correspondence. The Ministry is to return the records to AECL on request.

Having reviewed the representations of the parties and the records at issue, I am satisfied that the information was received by the Ministry in confidence. I accept the evidence of the Ministry that it received the information from AECL and AECB on the understanding that it would be kept confidential. Given the nature of the fissionable material stored at the AECL Chalk River site, it is reasonable to assume that the parties would expect the information to be held in confidence.

Therefore, I find that disclosure of Records 1, 3, 9, 22, 24, 27, 28, 30, 32, 37, 38, 41, 47 and 49 would reveal information received by the Ministry in confidence from another government or its agencies. Accordingly, the section 15(b) exemption applies to these records.

One affected party consented to the disclosure of a record it created. However, because the record may reveal information in which other affected parties may have an interest, I cannot order the record disclosed to the appellant.

However, in its representations, AECL states that the following tables have been made public by AECL and it is no longer claiming that the following figures should be exempted from disclosure.

Record 1: page 3.7 all Figure 3.2, page 5.45 all Figure 5.18, page 5.47 all Figure 5.20
Record 22: page 3.6 all Figure 3.2, page 5.45 all Figure 5.18, page 5.47 all Figure 5.20

Because AECL has stated that this information has been made public, it would not be appropriate to protect it as "received in confidence". Similarly, it would be inappropriate to find that the information had been supplied in confidence for the purposes of section 17 or to find that it s disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution (section 15(a)). Section 16 would also not apply.

Therefore, the tables should be disclosed to the appellant.

COMPELLING PUBLIC INTEREST

Section 23 states that an exemption from disclosure of a record under sections 13, **15**, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. Section 23 does not apply to records found to be exempt under section 12 of the Act.

The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question (Order 24).

The Act is silent as to who bears the burden of proof in respect of section 23. The burden of proof in law generally is that a person who asserts a position must establish it. However, where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant (Order P-1190). Therefore, the nature of the information contained in the record may also play a role in the determination of whether there is a compelling public interest in the disclosure of the information.

Accordingly, in addition to considering the representations of the parties on this issue, I have also reviewed the records with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the section 15(b) exemption.

The appellant states that recent events involving Ontario Hydro's nuclear facilities demonstrate that the public interest in nuclear information has become even more compelling.

The appellant states that these events in the nuclear industry make it imperative that the public have an opportunity to become fully informed about the dangers that are associated with the storage, handling and treatment of waste at AECL's waste facility at Chalk River. The appellant states that this knowledge goes to the very root of the public's ability to intelligently comment on the future of nuclear energy in Canada. It states that the creation of energy by nuclear facilities always involves the creation of long lasting nuclear and other wastes. However, the appellant also admits that it is unfair to judge AECL on the basis of recent concerns about Ontario Hydro's nuclear power generation.

The Ministry states that the information already released in response to the appellant's request is sufficient to understand the environmental impact of AECL activities. In addition, AECL states that it carries out ongoing community relations and public information programs concerning the Chalk River Laboratories, including facility tours, briefings of and meetings with local elected officials, and public meetings and "open houses". AECL submits that the public interest is protected by these activities, and there is, therefore, no compelling public interest in the disclosure of the information at issue here that outweighs the purpose of the section 15.

The appellant also states that, in addition to general concerns, there has been public debate concerning possible radioactive contamination at AECL's Chalk River site.

The appellant submits that to deny access to Record 1 is to deny to the public crucial information that relates directly to the protection of the natural environment and to public health and safety. It states that for decades there has been a shroud of secrecy drawn around the nuclear industry and its government regulators. The appellant states that it will release to the public any information that is obtained from the records which are the subject matter of this appeal.

A number of previous orders have discussed the issue of a compelling public interest in the issue of nuclear safety (Orders P-270, P-1190 and P-956).

In Order 270, which involved a request for agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee (SOATIC), which were denied by Hydro under section 17(1) of the Act, former Commissioner Tom Wright discussed the issue of nuclear safety and section 23 when considering whether there was a compelling public interest in disclosure of nuclear safety related information. He stated:

> In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution [Hydro] and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal, disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.
>
> I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public.

> Accordingly, certain information, almost by its very nature, should generally be publicly available.
>
> In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.

Assistant Commissioner Tom Mitchinson quoted from Order 270 and made a similar finding in Order P-1190 which involved a request for all peer evaluation reports conducted on nuclear power plants operated by Ontario Hydro.

Former Assistant Commissioner Irwin Glasberg also dealt with the issue of nuclear safety in Order P-901, which also involved Ontario Hydro. In that case, he found that records prepared by a working group involved in nuclear emergency planning qualified for exemption under section 12 of the Act (Cabinet records), which is not subject to the section 23 public interest override. However, he went on to state that:

> Were it not for the fact that the records at issue are subject to the Cabinet records exemption, I would have had no hesitation in finding that there exists a compelling public interest in the disclosure of these documents which clearly outweighs the purposes of the exemptions found in the Act.

(See also Order P-956).

I agree with these comments, and find that there is a compelling public interest in disclosure of records concerning nuclear safety. In my view, this interest extends to information about the storage and disposal of nuclear waste. The question which remains is whether this compelling public interest is sufficient to clearly outweigh the purpose of the section 15 exemption in respect of the disclosure of these records.

In Order 263, former Commissioner Wright stated that the purpose of section 15(b) is to protect the free flow of information from other governments or their agencies to Ontario institutions who are carrying out their respective "governmental" functions.

The Ministry states that any public interest in the issue of nuclear safety does not outweigh the purpose of the exemption. The Ministry explains that because the land occupied by AECL is federally controlled land, the Ministry has no regulatory function in dealing with AECL. The Ministry is only responsible for contamination that migrates off federal property onto provincially regulated lands, water or groundwater. According to the Ministry, none of the records at issue pertains to contamination that has migrated onto provincially regulated lands.

The Ministry states that its staff sit on a committee with AECL and Environment Canada, at the invitation of AECL to discuss matters that **may** affect the environment. It states that if the Ministry discloses records received in confidence from AECL, it will be prejudiced as the free flow of information to it from AECL would be curtailed or the Ministry staff may not be invited to attend the meetings where mutual interests are discussed.

The representations of the parties demonstrate that there are differing points of view on the

Ministry's jurisdiction over environmental issues relating to AECL. The Ministry argues that its presence at meetings which relate to the records at issue is by invitation of AECL. In the circumstances of this appeal, any compelling public interest in the records must be weighed against the public interest inherent in the purpose of section 15(b) - in this case to protect the co-operative free flow of information from AECL and AECB to the Ministry.

The records indicate that Ministry is in regular attendance at inspection meetings and comments on reviews of AECL's facility and practices. Even if the Ministry cannot claim any jurisdiction over the activities of AECL, the records indicate that it provides both advice and expertise to AECL on a regular basis on issues which have the potential to affect the environment. The Ministry states that receiving information about the facilities and activities at Chalk River is helpful in the pursuit of its mandate with respect to the area surrounding the facility.

I find that, in the circumstances of this appeal, the compelling public interest in disclosure does not **clearly** outweigh the purpose of the sections 15(b) exemption. I agree with the Ministry that in the circumstances of this appeal where the Ministry has no clear jurisdiction to govern the activities of AECL, the protection of the free flow of information which relates most importantly to the Ministry's mandate to protect the environment outweighs the public interest in the information at issue.

Therefore, section 23 of the Act does not apply.

Because of the manner in which I have decided this appeal, I need not consider the application of sections 15(a), 16 and 17.

ORDER:

1. I order the Ministry to disclose Record 59 and the figures from Records 1 and 22 referred to on page 7 of this order by sending a copy of the record and the figures no later than **April 21, 1998**.

2. I uphold the Ministry's decision to withhold the remaining records.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: March 31, 1998
Marianne Miller
Inquiry Officer